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IN THE SUPERIOR COURT, DIVISION III OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MOHAVE

STATE OF ARIZONA,

Plaintiff,

vs.

JOHN CHARLES MCCLUSKEY,

Defendant.

Case No.: CR-2010-00823

MOTION TO REMAND
TO THE GRAND JURY

Oral Argument Requested

The Defendant, through counsel undersigned and pursuant to Rule 12.9 of the Arizona Rules of Criminal Procedure, moves this Court to remand this case to the Grand Jury for a re-determination of probable cause. A motion to challenge grand jury proceedings may be filed within 25 days of arraignment or the filing of the grand jury transcript, whichever is later Rule 12.9(b). In this case, the Defendant's arraignment was held on August 23, 2010, but the grand jury transcript was not filed until September 7, 2010. The present motion is therefore timely.

The Defendant submits the following memorandum in support of this motion.

MEMORANDUM

I FACTS

The Defendant was indicted by a grand jury on August 19, 2010. The indictment charges the Defendant with eight counts: one count of Escape in the Second Degree, a Class 5 Felony; two counts of Kidnapping, a Class 2 Felony; two counts of Armed Robbery, a Class 2 Felony; two counts of Aggravated Assault, a Class 3 Felony; and one count of Misconduct Involving Weapons, a Class 4 Felony.

According to the attached transcript of the grand jury proceedings, one of the jurors assigned to jury duty on August 19, 2010, was [REDACTED] Exhibit A at 3. However, when the prosecutor called out names to determine which jurors were present that day, no [REDACTED] was called. Instead, someone named '[REDACTED]' was called; [REDACTED] responded that he was present. Exhibit A. The record indicates there were 16 grand jurors present when evidence regarding this case was presented; however, there is no further clarification about [REDACTED] or [REDACTED] identity, or which person was present at that time.

Later, once the prosecutor finished reading the relevant statutory code for this particular investigation, the following exchange took place:

GRAND JUROR [REDACTED]: These counts are against all the people together you said; right?

MS. STAZIO: All the counts except for the misconduct involving weapons are against all four suspects. The misconduct involving weapons are only against the Province and McCluskey suspects.

GRAND JUROR [REDACTED]: So in those cases the only way to vote is for all of them or none of them?

1 MS. STAZIO: Correct.

2 GRAND JUROR [REDACTED]: Okay.

3 MS. STAZIO: If you felt as a Grand Jury that you wanted the
4 charges against some of them and the charges not against other
of them [sic], you have the right to change the indictment.

5 Exhibit A at 15. The prosecutor offered no further information in response to this line of
6 inquiry by Grand Juror [REDACTED].

7 The State's sole sworn witness at the grand jury proceedings was Detective Jason
8 Elsbury of the Mohave County Sheriff's Department. At one point, the prosecutor elicited the
9 following testimony from Elsbury, regarding a cell phone number found in a jacket:

10 Q: . . . [W]ho did that cell phone number belong to?

11 A: Casslyn Welch.

12 Q: And she's also one of the suspects that is in the investigation?

13 A: Yes, she is.

14 Q: Okay.

15 A: She was identified as the girlfriend of inmate John McCluskey.

16 Q: Girlfriend *and first cousin*; correct?

17 A: Yes.

18 Exhibit A at 24 (emphasis added).

19 II. LEGAL ARGUMENT

20 Although practitioners may sometimes view the grand jury as a mere procedural
21 hurdle, it is intended to be much more. In Maretick v. Jarrett, 204 Ariz. 194, 197 (2003), the
22 Arizona Supreme Court affirmed that the grand jury is

23 'a primary security to the innocent against hasty, malicious and oppressive persecution
24 The grand jury's mission is 'to bring to trial those who may be guilty and clear the innocent.'
25 To do its job effectively, the grand jury must receive a fair and impartial presentation of the
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1 evidence. Because defendants enjoy few procedural rights before the grand jury, grand juries
must be unbiased and independent and must act 'independently of either prosecutor or judge'

2 (citations omitted). As such, a case must be remanded to the grand jury for a re-determination
3 of probable cause where a defendant has been denied a "substantial procedural right." Rule
4 12.9(a). See also Ariz. Const. Art. 2 § 4 (defendants have right to due process). Remand is
5 also required where "an insufficient number of qualified grand jurors concurred in the finding
6 of the indictment." Id.

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8 **A. The State Violated the Defendant's Due Process Rights By Improperly
Instructing the Grand Jury Regarding the Scope of its Authority.**

9 Arizona courts have repeatedly "stress[ed] the unique trust vested in prosecutors in
10 their role as 'ministers of justice' when assisting the grand jury in its function." Maretick v.
11 Jarrett, 204 Ariz. 194, 196-197 (2003).

12 The prosecutor's role before the grand jury is unique in our system. The prosecutor acts not
13 simply as an advocate, but as a 'minister of justice,' who assists the jurors in their inquiry.
Prosecutors bear a 'particularly weighty duty not to influence the jury because the defendant
14 has no representative to watch out for his interests' before the grand jury. . . . [T]he prosecutor
must 'give due deference to [the grand jury's] status as an independent legal body.'
15 Significantly, the initiation and control of questioning 'rests with the grand jury and not the
prosecutor.' In other words, the prosecutor's powers 'are derived from the grand jury; it is the
grand jury that possesses the broad investigative powers, and . . . must be the decisionmaker.'
16 It is not the prosecutor's role to deflect the grand jury from its inquiry.

17 Id. at 197. In the present case, the prosecutor did not "give due deference" to the grand jury
18 "as an independent legal body," id., because she agreed with a grand juror that "the only way
19 to vote" was to indict all the defendants or none of them on counts where multiple defendants
20 were listed in the proposed indictment. Exhibit A at 15. A grand jury is not, of course,
21 obligated to accept the State's proposed indictment. During opening admonitions, a
22 prosecutor had properly instructed the grand jury to this effect. See Exhibit A at 5. However,
23 at least one grand juror clearly did not understand this admonition, as evinced by the content
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1 of her question. *Id.* at 15. The prosecutor told this juror that her understanding was “correct,”
2 despite clearly being mistaken as a matter of law. *Id.*

3 The State may argue that the prosecutor corrected this obvious mistake when she later
4 said that the grand jury has “the right to change the indictment.” *Id.* However, she did *not*
5 explain how the jurors could do this—for example, by crossing out some names from the
6 proposed indictment, or from a particular count therein. It may be obvious to a practitioner
7 that grand jurors are permitted to do this. Presumably, though, this juror would not have been
8 aware of how to make such a change, particularly when she was unaware she even had the
9 authority to do so, despite having been admonished to that effect earlier in the day.

10 Although the prosecutor’s correction was certainly a step in the right direction, it was
11 insufficient under the circumstances. Therefore, the prosecutor did not act as a “minister of
12 justice” and did not “give due deference to the grand jury’s status as an independent legal
13 body” in this case. 204 Ariz. at 197.

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15 **B. The State Violated Due Process By Presenting Irrelevant And Highly**
16 **Prejudicial Evidence of Defendants’ Relationship.**

17 The State elicited testimony from Elsbury that McCluskey was both the girlfriend and
18 first cousin to co-defendant Welch. The information initially provided by Elsbury—that
19 Welch was McCluskey’s girlfriend—was clearly sufficient to make the point that these co-
20 defendants were not strangers. The prosecutor’s addition that Welch was McCluskey’s first
21 cousin clearly had no rationale save to prejudice the jurors against McCluskey. Although
22 Arizona cases suggest that irrelevant evidence by itself is not sufficient to trigger a due
23 process violation, the highly prejudicial nature of this information militates in favor of remand
24 in this case.
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2 C. The State Failed to Ensure That Juror [REDACTED] or [REDACTED] Was Present
3 and Qualified.

4 Pursuant to A.R.S. §21-409(A), it is the responsibility of the court and the county
5 attorney to ensure that grand jurors are qualified to serve. The qualifications are enumerated
6 in A.R.S. §21-202; specific grounds for disqualification are found in Criminal Procedure Rule
7 12.2. Remand is proper where the State fails to establish grand jurors' qualifications. State v.
8 Superior Court In and For Pima County, 102 Ariz. 388 (1967); State v. Ahee, 6 Ariz.App. 265
9 (1967).

10 In this case, the grand jury transcript indicates that a man named [REDACTED]
11 [REDACTED] was supposed to serve on the date the Defendant was indicted. However, a man
12 named [REDACTED] indicated his presence on that date. It is possible that these two
13 names represent the same individual. It is conceivable, however, that the wrong person was
14 called for jury duty, or that there were two individuals (a [REDACTED] and a [REDACTED])
15 called on the same date. It is, furthermore, possible that the individual sitting as a juror when
16 the evidence against the Defendant was presented was *not* the same individual who was read
17 the admonitions earlier in the day.

18 From the record, the Court cannot be certain that the juror who sat in judgment of Mr.
19 McCluskey took the oath required by Rule 12.1(c), nor that he was informed of his duty to
20 disqualify himself pursuant to Rules 12.1(d)(4) and 12.2. Nor can the Court be certain that
21 the grounds for qualification in A.R.S. §21-201 were met. Therefore, the case should be
22 remanded to ensure the case against the Defendant is heard by a properly qualified jury.
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2 **D. These Errors Prejudiced the Defendant.**

3 At least one grand juror in this case contemplated returning a true bill against some,
4 but not all, of the co-defendants. She was initially told that she could not do this. That
5 statement was then corrected to indicate that she could "change" the indictment, but she was
6 given no instructions as to how to accomplish this. Later, the prosecutor elicited irrelevant
7 and prejudicial information that could have no purpose other than to bias the jury against two
8 of the co-defendants, one of whom is Mr. McCluskey. Finally, one of the grand jurors sitting
9 when the evidence against the Defendant was presented may not have been qualified to serve.
10 Taken together, these errors demonstrate that the Defendant was denied "substantial
11 procedural right[s]" resulting in an unfair presentation of his case to the grand jury in
12 violation of Rule 12.9(a) and the Arizona Constitution's Due Process Clause.

13 The State will likely argue that harmless-error analysis applies to grand jury
14 proceedings. It is, of course, impossible to know for certain what would have happened had
15 the jurors in this case been properly instructed about their rights, and had not been presented
16 with such prejudicial evidence, and had all been admonished regarding their qualifications.
17 However, "[w]e must be confident beyond a reasonable doubt that the error[s] had no
18 influence on the jury's judgment." Maretick, 204 Ariz. at 198, quoting State v. Bible, 175
19 Ariz. 549, 588 (1993). Reasonable doubt exists in this case as to whether the jury would have
20 reached the same decision had these errors not occurred. The aforementioned violations were
21 therefore not harmless.

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Exhibit A

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